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No. 91-1747

In The

Supreme Court of the United States

October Term, 1991

WESTERN FARM CREDIT BANK,

Petitioner,

vs.

ELMER FOBIAN and ELSE FOBIAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WAYNE B. HARBARGER, III
Attorney for Respondents
3445-A American River Drive
Sacramento, California 95864
(916) 485-5585

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is properly invoked under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

The main rationale presented by the petitioner in the writ of certiorari is that there exists a conflict between the Circuit Courts of Appeals which mandates that this Court resolve the conflict. The petitioner attempts, in the petition, to establish a conflict between the Second, Sixth and Eleventh Circuits and the Ninth Circuit with regard to the awarding of contractual attorney fees in bankruptcy cases. As indicated below, the alleged conflict is non-existent.

The petitioner has also attempted to show a conflict within the Ninth Circuit Court of Appeals which is non-existent.

The petitioner has requested this Court to judicially legislate an exception to the bankruptcy code which would allow contractual attorney fees to successful litigants under applicable state law. That request is inappropriate.

I.

BACKGROUND

In federal bankruptcy law, there is no statutory authority for award of attorney fees based on a contractual relationship of the parties. *See In re Martin*, 761 F.2d 1163 (5th Cir. 1985); *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505 (11th Cir. 1991); *In re Jordan*, 927 F.2d 221 (5th Cir. 1991). Congress has specifically codified two (2) circumstances for the award of attorney fees to a party.

The creditor's provision, 11 U.S.C. § 506(b), allows an award of attorney fees to oversecured creditors, up to the limit of the value of their collateral.

> (b) To the extent that an allowed claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there should be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

A debtor may be awarded attorney fees, pursuant to 11 U.S.C. § 523(d), if the debtor prevails in non-dischargeability litigation, brought under 11 U.S.C. § 523(a)(2), regarding a consumer debt.

> (d) If a creditor requests a determination of dischargeability of a consumer debt under section (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Additionally, the Bankruptcy Court has the general inherent power to punish the behaviors of bad faith or harassment with an award of attorney fees. *In re Fulweiler*, 624 F.2d 908 (9th Cir. 1980).

This petitioner is asking the Court to use *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991) to judicially create new law which would (1) allow all creditors to obtain attorney fees from the debtor for participating in a debtor's chapter 11 case; (2) allow attorney fees on unsecured claims; and (3) allow successful creditors their

attorney fees in non-dischargeability actions (Petitioner's Petition, 13-18). For the same reasons that Congress has refused to write the requested bankruptcy provisions, despite vigorous lobbying of the institutional lenders, this Court should avoid judicial legislation. The bankruptcy code is designed with a very delicate balance to allow neither the debtor nor creditor the leverage to force a compromise against its best interests. The insertion by Congress of the two code provisions allowing attorney fees was designed to prevent historical abuses by the debtors and creditors. The lack of reciprocal attorney fees in § 523(d) was intentional. *In re Martin, supra*. Congress has achieved a balance of power which should not be judicially disturbed.

II.

SUMMARY OF CIRCUIT COURT CASES ALLEGED IN CONFLICT

The petitioner has pointed to several Circuit Court cases which have allowed the contractual rights of the parties to supersede the federal bankruptcy law. The petitioner indicates that these cases are in conflict with *Fobian* and, therefore, there needs to be a resolution of the conflicting Circuits. The following summary of the Circuit Court cases is offered to show the lack of conflict among the Circuits and illustrate the difference between *Fobian* and the cases offered as conflicting. The respondent has added the Fifth Circuit case of *Jordan, supra*, as it is identical to the Sixth and Eleventh Circuit cases.

A. Ninth Circuit — *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)

Fobian is a Ninth Circuit Court of Appeals case relating to confirmation of a Chapter 12 plan. The sole issue before the Bankruptcy Court was whether, under § 1225(a)(5)(C), the debtor must pay an undersecured claim if it surrenders the collateral for

a loan. The validity of the contract was not in question nor was the alleged amount of the claim or the various components thereof. The issue was (and is) one of first impression and the Bankruptcy Court found in favor of the debtor. The appellate courts reviewing the matter assumed an undersecured claim and reversed the Bankruptcy Court. The Ninth Circuit Court found that the § 1225(a)(5)(C) issue was one solely of interpretation of a federal bankruptcy code section and did not award attorney fees to the creditor (Western Farm Credit Bank).

The petitioner correctly states that *Fobian* is illustrative of the prior decisions of the Ninth Circuit and stands for the rule first enunciated in *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), that "with the exception of small amounts allowed under section 1923, the rule 'has long been that attorney fees are not ordinarily recoverable. . .' " (citing *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 at 717). The rule as restated in *Fobian* is

> . . . where the litigated issues are not basic contract enforcement questions, but issues peculiar to federal bankrupcy law, attorney fees will not be awarded absent bad faith or harassment by the losing party.

The Ninth Circuit has previously described the bais for the rule of non-applicability of contractual attorney fees as *espressio unius est exclusio alterius*. This maxim of statutory construction means that "the expression of one thing is the exclusion of another". *In re Sakowitz*, 110 Bankr. 268 (S.D. Tex. 1989). The awarding of attorney fees rule is one peculiarly within the function of Congress, not the federal courts, and Congress has not deemed it appropriate to allow contractual attorney fees to be awarded in bankruptcy cases.

The cases described as in conflict by the petitioner are briefly described below. As the Court will recognize, the cases are not only not in conflict but not even dealing with the same issue.

B. Second Circuit — *In re United Merchants and Manufacturers, Inc.*, 674 F.2d 134 (2d Cir. 1982)

United Merchants is a Bankruptcy Act case which allowed the contractual award of attorney fees to two unsecured creditors, Two lenders had loaned the debtor $45,000,000 in unsecured loans. The case arose from an objection to the claims of the lenders by the Chapter 7 trustee to the "collection costs" and liquidated damages clauses requested by the two unsecured creditors. The Second Circuit Court of Appeals decided that there was no statutory bar to contractual fees or liquidated damages under the Act and since the creditor presumably bargained for the right to receive its "collection costs" or liquidated damages, the creditor was entitled to the benefit of its bargain. The case revolved around the equal bargaining power of the debtor and the creditor. The court indicated through dicta, that the new "Code" had no prohibition against the award of attorney fees as part of a claim to unsecured claims

C. Fifth Circuit — *In re Jordan*, 927 F.2d 221 (5th Cir. 1991)

Jordan is a case under § 523(a)(2)(B) relating to non-dischargeability of debt because of a false financial statement to a lender. The Fifth Circuit Court of Appeals affirmed the District Court's and Bankruptcy Court's decision that the debt was non-dischargeable and awarded the creditor its attorney fees incurred in the adversary action. The court found that although the creditor had no statutory basis for attorney fees under § 523(d), the creditor is entitled to contractual attorney fees because the Code only envisions discharging debts of "honest debtors."

D. Sixth Circuit — *In re Martin*, 761 F.2d 1163 (5th Cir. 1985)

Martin is another case involving non-dischargeability of a claim based upon § 523(a)(2)(B). The debtor had filed a false financial statement to obtain two loans with Bank of Germantown. Less than three months after receiving the second loan, the debtors filed a Chapter 7 petition. The bank filed an adversary action for non-dischargeability which was successful. The Sixth Circuit Court of Appeals allowed the Bank its contractual attorney fees because the successful creditors are allowed their attorney fees as part of their bargained for contractual rights.

E. Eleventh Circuit —*Transouth Financial Corporation of Florida v. Johnson*, 931 F.2d 1505 (11th Cir. 1991)

Transouth is the third case under § 523(a)(2) (non-dischargeability of a claim based on fraud) which was resolved by a written stipulation. The stipulation required the debtor to repay all of the principal, accrued interest and the attorney fees and costs of the creditor incurred in the collection of the promissory note executed by the debtor. The note contained an attorney fees provision which was permissible under Florida state law. The case, contrived by the creditor to put the issue before the Eleventh Circuit Court of Appeals, was argued without opposition. On a split decision, the Eleventh Circuit held that a successful creditor in a non-dischargeability action may recover contractual attorney fees because the debtor was not an "honest debtor." The court stated at page 1508,

> Fraudulent conduct is best discouraged, not only by . . . [recognizing that] the creditor who has been defrauded is entitled to all of its rights under the contract, including reasonable attorney fees . . . . (citing several cases).

The cases of the Fifth, Sixth and Eleventh Circuits involved dishonest debtors who were found to have fraudulently obtained money from lenders pursuant to non-dischargeability actions. The Courts found that the debtors should not, as a general policy, be entitled to escape the additional penalty of imposition of the creditors attorney fees and costs because they were not "honest debtors." In *United Merchants, supra*, the Second District case, the court did not find misconduct but felt that the relatively equal bargaining power and the sophistication of the parties validated the contractual "collection costs" clause contained in the contract.

In contrast, Mr. and Mrs. Fobian are small farmer debtors who had advanced a previously untried federal bankruptcy legal theory which was successful at the trial level and unsuccessful at the appellate level. There has never been an allegation of any misconduct on the part of Mr. and Mrs. Fobian. There is no question of the unequal bargaining power of the Western Farm Credit Bank (formerly known as the Federal Land Bank) and Mr. and Mrs. Fobian. The cases described as in conflict are inapposite. The *Fobian* case is inappropriate for the purposes of making the law requested by the petitioner.

III.

THE NINTH CIRCUIT IS NOT INCONSISTENT WITH ITSELF.

The Ninth Circuit Court of Appeals opinion of *In re J.F. Hink & Son*, 815 F.2d 1314 (9th Cir. 1987), is consistent with the Fifth, Sixth and Eleventh Circuits and is not inconsistent with the *Fobian* opinion. In *Hink, supra,* the Ninth Circuit awarded contractual attorney fees to the trustee when a party attempted to repudiate its post petition contract to purchase a lease from a bankruptcy estate. The defense offered by the offending party was lack of notice of a renegotiation of rent clause in the assumed

lease. The Ninth Circuit was acerbic in its decision when it stated:

> The transcript of the hearing before the bankruptcy Court makes plain beyond doubt, cavil or argument that the terms of the garage lease were well understood by Cukierman and his counsel . . .

The Court awarded the trustee

> . . . the costs and attorneys fees it has incurred at every stage of this proceeding from the beginning of its motion in the bankruptcy Court to clarify the July 12, 1985 motion.

When a party, debtor or not, attempts to act in a manner to abuse the bankruptcy Court process, the Ninth Circuit has penalized the offending party with the costs of litigation, including the attorney fees of the innocent party(ies).

IV.

THE UNITED STATES SUPREME COURT HAS PREVIOUSLY DENIED JUDICIALLY CREATED ATTORNEY FEES PROVISIONS.

This Court has previously made a determination of an analogous issue in *Alyeska, supra*, when Justice White wrote,

> we need labor the point no further. It appears that the rule suggested here and adopted by the Court of Appeals (the private attorney general theory) would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue (awarding of

> attorney fees) has been to carve out specific exceptions to a general rule that federal Courts cannot award attorney's fees beyond the limits of 28 USC 1923, those Courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation, or to pick and choose among plaintiffs and the statutes under which they sue and to award attorney fees in some cases but not in others, depending upon the Courts' assessment of the importance of the public policies involved in particular cases. . . .

The request of the petitioner for this Court to use *Fobian* to allow the award of contractual attorney fees in bankruptcy cases is a request for judicial legislation. This request is without merit.

CONCLUSION

The petitioner has attempted to show a conflict between the Circuit Courts of Appeal which is non-existent. The petitioner has falsely alleged a conflict within the reported decisions of the Ninth Circuit regarding the awarding of contractual attorney fees. The petitioner is requesting this Court to judicially create an exception to the bankruptcy code which would endanger the delicate balance of financial leverage between the debtors and creditors created by Congress.

There is no adequate justification for the granting of a writ of certiorari in this case. The petition should be denied.

Respectfully submitted,

WAYNE B. HARBARGER, III
Counsel of Record
LAW OFFICE OF
WAYNE B. HARBARGER, III
Attorney for Debtors/Respondents